Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1677

HUGH CAREY, *etc., et al.*,

Petitioners,

—against—

ANTONIA ECHEVARRIA, individually and on behalf of all others similarly situated,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT ANTONIA ECHEVARRIA, *ETC.*, IN OPPOSITION

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PRELIMINARY STATEMENT

Respondent Antonia Echevarria, individually and on behalf of all others similarly situated, opposes the petition for certiorari of Hugh Carey, et al.

ARGUMENT

No Issue Warranting This Court's Consideration Is Raised

This case is simply another durational residency case, raising issues already adjudicated by this Court in Dunn v. Blumstein, 405 U.S. 330 (1972), and its progeny. This Court on numerous occasions has articulated the standards to be applied in such cases where fundamental personal rights and liberties are abridged. See Buckley v. Valeo, __U.S.__, 46 L.Ed. 2d 659 (1976); Goosby v. Osser, 409 U.S. 512 (1973); Dunn v. Blumstein, supra; City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Evans v. Cornman, 398 U.S. 419 (1970); Kramer v. Union Free School District, 395 U.S. 621 (1969); Carrington v. Rash, 380 U.S. 89 (1965).

There can be no question that with respect to the class members who are absolutely barred from voting in New York's primary elections by the operation of Section 186 of the Election Law, the courts below dutifully and correctly applied the applicable constitutional standards, and consequently the petition is not worthy of review.

The claimed conflict with Rosario v. Rockefeller, 410 U.S. 752 (1973), on which the petition principally relies, is non-existent. The frivolousness of petitioners'

claim was apparent to the Court of Appeals for the Second Circuit which, two days after hearing argument, affirmed the decision of the District Court on that court's opinion.

In Rosario, this Court expressly declined to rule whether Section 186 of New York's Election Law imposed an unconstitutional durational residency requirement when applied to recently arrived residents of the State since the Rosario petitioners lacked standing to raise the claim. Id. at 759 n. 9. See Hill v. Stone, 421 U.S. 289, 300 n. 9(1975). The two courts below correctly concluded that the claims of respondent here were raised but not reached in Rosario, and that the Rosario decision and rationale were not applicable.

As applied to Rosario petitioners, who were persons who established voter residency prior to the enrollment deadline of Section 186, the statute had only an incidental effect on the right to vote and the freedom of political association. As this Court observed, if the plight of the Rosario petitioners "can be characterized as disenfranchisement at all, it was not caused by Section 186, but by their own failure to take timely steps to effect their enrollment." Id. at 757-58. See also O'Brien v. Skinner, 414 U.S. 524,537 (1974) (Rehnquist, J., dissenting).

Respondent and the class members here are recently arrived residents. Unlike Rosario petitioners, there was nothing the respondent could have done to make herself eligible to vote. See Kusper v. Pontikes, 414 U.S. 51,60-61 (1973).

This Court in Hill v. Stone in discussing Rosario emphasized that Section 186 was found not to restrain the exercise of the right to vote because it "served the 'legitimate and valid state goal' of 'preservation of the integrity of the electoral process,'" supra at 300, and "because it imposed no special burden on any class before the Court." Id. at 302 (emphasis added).

Subsequent to Rosario, this Court made clear that a state's interest in preventing party raiding was not sufficient to justify the substantial abridgement of a voter's rights under the First and Fourteenth Amendments, Kusper v. Pontikes, supra at 60-61 (1973), and has not hesitated to invalidate statutes that absolutely prohibit the right to vote, O'Brien v. Skinner, supra, unnecessarily abridge associational freedoms, Buckley v. Valeo, supra, or impinge on the right to interstate travel, Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

As applied to respondent, Section 186 imposes special burdens that directly impact on fundamental rights, and "conspicuously infringes upon basic constitutional liberty," Kusper v. Pontikes, supra at 60-61. And, simply because Section 186 was determined to further a valid state interest when applied to long-time residents, does not foreclose a finding of unconstitutionality as a durational residency requirement when applied to recently arrived residents, who are absolutely and impermissibly disenfranchised by its application. The durational residency requirement imposed by Section 186 of up to eleven months clearly exceeds the "outer constitutional

limits," Burns v. Forston, 410 U.S. 686, 687 (1973).[1]

The courts below did not substitute their judgment for that of the legislature, but exercised their judicial responsibility to subject to the closest scutiny those laws which curtail fundamental rights. Buckley v. Valeo, supra; Shapiro v. Thompson, 394 U.S. 618 (1969). The deference usually accorded to the judgments of legislators, the general presumption of the constitutionality of state statutes, and the application of the 'rational basis' standard for the distinctions made by a statute, are not applicable when a statute denies to some, but not others, the right to vote, the right to political association and the right to interstate travel. Kramer v. Union Free School District, supra at 627-628 (1969); Memorial Hospital v. Maricopa County, supra at 262-263, 268; Shapiro v. Thompson, supra; Dunn v. Blumstein, supra. In ruling that the petitioners, in seeking to protect a compelling state interest, "cannot choose means that unnecessarily burden or restrict constitutionally protected activity," the courts below followed established constitutional doctrine. Buckley v. Valeo, supra; Cousins v. Wigoda, 419 U.S. 477,488 (1975); Shelton v. Tucker, 364 U.S. 479,488 (1960).

The lower courts found that the sweep

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[1] The issues respecting Section 187 which the petition claims were ignored, were given full consideration by the courts below. The cases applying Section 187 to county-to-county movers were all properly distinguished (App. 15a, n. 22) and the Second Circuit refused to be bound by them.

of Section 186 was overly broad and indiscriminate, and declared the statute unconstitutional by following the mandate of this Court that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." Kusper v. Pontikes, supra at 58, quoting from NAACP v. Button, 371 U.S. 415, 438. There is no reason for this Court to depart from these long established principles.

The amendment to Section 369 (1) of New York's Election Law, signed by Governor Carey on June 1, 1976, which petitioner asserts "will allow citizens in respondent's class (and others) to enroll up to sixty days before a spring or fall primary,"[2] is but another reason for the Court to deny the petition for certiorari.

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[2] Letter from A. Seth Greenwald, attorney for petitioners, to Michael Rodak, Jr., Clerk of the Supreme Court of the United States, June 8, 1976.

CONCLUSION

This Court has long recognized, and recently restated, that the "Court's decisions involving associational freedoms establish that the right of association is a 'basic constitutional freedom' that is "closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." Buckley v. Valeo, supra at 691, quoting from Kusper v. Pontikes, supra.

The decisions in this case are entirely consistent with the Court's rulings concerning associational freedoms, the right to vote and the right to travel. The petition, based on an imagined conflict with Rosario v. Rockefeller, is unworthy of certiorari, and should be denied.

DATED: June 16, 1976

Respectfully submitted,

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